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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

LOREN WAYNE MILLSAP,

Defendant and Appellant.

A107603

(Humboldt County
Super. Ct. No. CR030643S)

After an advisement of his constitutional rights, Loren Wayne Millsap pleaded guilty on May 8, 2003 to one count of first degree burglary, conditional upon the court granting probation. At the sentencing hearing, the court found there were unusual circumstances justifying a grant of probation. Based on several aggravating factors and the absence of any circumstances in mitigation, the court imposed a suspended sentence of six years imprisonment and placed Millsap on formal probation for four years. Millsap expressly affirmed his understanding of the terms and conditions of his probation, including the requirement that he abstain from drug and alcohol use. Defense counsel agreed with the court's calculation of 279 days of credits.

On May 18, 2004, the probation department filed a notice of probation violation describing four incidents in which Millsap had allegedly violated terms of his probation. According to the notice, Millsap was involved in a fight on February 27, 2004 at an establishment called the Moose Lodge. He showed signs of intoxication, gave sheriff's deputies a false name, and left the scene before the deputies realized he had signed a complaint form using a different name. On March 9, 2004, Millsap was cited for driving with a suspended license and having no proof of insurance and no side mirror. On March

18, 2004, Millsap was riding in a car that was stopped because it was weaving erratically. The driver, who was arrested for drunk driving and other offenses, told Highway Patrol officers he and Millsap had been drinking at the Moose Lodge and were on their way to another bar to continue drinking. Finally, on May 7, 2004, sheriff's deputies who responded to a complaint of loud noises at an establishment saw Millsap leave the bar area. Millsap, who appeared to be intoxicated, barricaded himself in the restroom and had to be dragged out by the deputies. He was arrested and booked for violating the terms of his probation and resisting arrest. (Pen. Code, §§ 1203.2, 148, subd. (a)(1).) Based on these incidents, the probation department alleged Millsap had violated the terms of his probation by failing to: (1) obey all laws; (2) comply with instructions of his probation officer; (3) totally abstain from the use of alcoholic beverages and not possess alcoholic beverages; and (4) refrain from entering places where alcohol is the chief item of sale.

The court summarily revoked probation and set the matter for a hearing. The probation department reported Millsap's performance on probation had been marginal and he continued to violate probation orders and the law. Regarding the alleged probation violations, Millsap told the department he had "a severe alcohol problem." However, because Millsap did not appear to be ready or fully willing to undergo treatment for this problem, and because he had repeatedly violated the terms of his probation by drinking alcohol and driving, the probation department recommended that probation be terminated.

On July 7, 2004, Millsap admitted the probation violation and pleaded guilty to a separately charged misdemeanor offense of driving with a suspended license (with a prior conviction for driving with a suspended license). Regarding the probation violation, Millsap was advised of and waived his rights to a court trial, to confront and cross-examine witnesses and present evidence, and to remain silent. He was also advised that he could be sentenced to a maximum term of six years in state prison for the violation.

At the sentencing hearing on July 28, 2004, Millsap's counsel advised the court that Millsap no longer wished to continue on probation, but instead preferred to serve a prison term. Consistent with the probation department's recommendation of a four-year prison term, Millsap wanted the court to impose this term. Counsel expressed his understanding that the court did not have authority to sentence Millsap to a different term than originally

imposed but nonetheless, in light of Millsap's request, asked the court to impose a prison term for the probation violation. The court agreed that it would be compelled to execute sentence for the six-year term previously imposed. The court then asked Millsap if he was indeed declining the opportunity to request a further grant of probation. Millsap responded: "Sir, I can honestly tell you I do need treatment. However, during the time it's going to take me to recover, treatment, it could be the possibility that I could relapse and be put back in the same proceedings; and therefore lose all my credits and going [*sic*] back to prison for six years. I don't want to take that chance. I'd rather get on the road and go." The court accepted Millsap's rejection of probation and ordered the previously suspended sentence of six years imprisonment imposed. Restitution fines of \$1,200 each were imposed pursuant to Penal Code sections 1202.4, subdivision (b) and 1202.45, and Millsap received a total of 344 days of credits for time served and good conduct. A timely notice of appeal followed.

Millsap's appellate counsel has filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436, identifying no potentially arguable issues. We have reviewed the entire record, and we agree with counsel's assessment that no issue warrants further briefing.

DISPOSITION

The judgment is affirmed.

McGuiness, P.J.

We concur:

Corrigan, J.

Parrilli, J.